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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/617,317	07/09/2003	Thomas M. Sauter	KTWO121444	2817

26389 7590 03/22/2005

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EXAMINER

KLEBE, GERALD B

ART UNIT	PAPER NUMBER
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3618

DATE MAILED: 03/22/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/617,317	Applicant(s) SAUTER ET AL.	
	Examiner Gerald B. Klebe	Art Unit 3618	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 December 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 15-27 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 15-27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 09 July 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

MB Klebe
10 March 2005

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>07/09/2003</u> <i>SUBSTITUTE COPY 4/8/04</i> | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

Amendment

The amendment filed 12/15/2004 under 37 CFR § 1.111 has been entered. Claims 15-27, as amended, are pending in the application, claims 1-14 being cancelled previously.

Information Disclosure Form -- Substitute Copy Provided

1. The examiner provides attached a copy of Applicant's Information Disclosure Form 1449 attesting to the examiner's consideration of all references cited by the Applicant in substitute for the copy provided with the previous Office Action wherein the examiner inadvertently failed to initial the foreign patent documents that had been considered. The examiner apologizes for any inconvenience that may have been incurred by the Applicant.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 15-16, 22-23, and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gierveld (US 5046746) in view of Swearington (US 5056509), cited by Applicant.

a. Gierveld discloses an in-line skate (Fig 4, item 11) comprising: **(re: claims 15 and 25; Note: claim 15 recites the terminology of an ankle support cuff; claim 25 recites the terminology of an ankle support assembly)**

a plurality of wheels (Fig 4, items 14, 15, 16);

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a base (17) defining an upper and lower surface, toe and heel ends, and a longitudinal axis generally from the toe end to the heel end;

a frame (13) secured to the lower surface of the base mounting wheels;

a pliable upper portion (12; note that the pliability of the upper portion is inferred from the use of shoe laces; see Fig 4) adapted to receive a skater's foot, the pliable upper portion being secured to the base (as shown in the Fig); and

(**re: the further limitation of claim 25**) wherein the upper portion extending upwardly from the base is adapted to terminate below the ankle of the received skater's foot (Gierveld in Fig 4 shows a low-cut shoe upper); and

(**re: claim 23**) wherein the base is substantially rigid (Fig 4, item 17; refer col 4, lines 34-35, col 5, lines 53-55).

b. Gierveld lacks explicit disclosure of **the further limitations of claims 15 and 25** of a substantially rigid internal heel counter disposed within the upper portion and fixedly secured to the base and projecting upwardly from the heel end of the base, and having a substantially rigid ankle support cuff (terminology of claim 15)/assembly (terminology of claim 25) extending upwardly from the upper portion and pivotally secured to the internal heel counter, wherein the cuff / assembly is pivotable substantially independently of the upper portion, and wherein the pivot is constrained to pivot about an axis transverse to the longitudinal axis defined by the base, and has an ankle pad lining an interior of the ankle support cuff.

c. However, Swearington (**re: claim 15 and re: claim 25**) teaches a substantially rigid internal heel counter and a substantially rigid ankle support cuff (terminology of claim 15)/assembly (terminology of claim 25) for use within a sport shoe, which internal heel counter

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projects upwardly from the heel end of the shoe and is disposed, mounted within, and covered by the upper portion, and wherein the ankle support cuff /assembly is pivotally secured to the internal heel counter at only lateral and medial sides thereof, and is pivotable independently of the upper portion and (re: **claim 16**) wherein the ankle support cuff/assembly is not mechanically attached to the upper portion; and (re: **claims 15 and 25**) wherein the pivot is constrained to pivot about an axis transverse to the longitudinal axis (Fig 1, item 14; refer col 1, line 66 to col 2, line 4 and col 3, lines 5-8) defined by the base of the upper portion.

EXAMINER'S NOTE 1: Swearington's ankle support cuff (terminology of claim 15)/assembly (terminology of claim 25) retains a pivot (Fig 5, item 14) constraining rotation about a transverse axis and a pivot constraining rotation about a longitudinal axis (Fig 5, item 17); therefore, the reference discloses at least the claimed limitation wherein the ankle support cuff /assembly is constrained to pivot about an axis transverse to the longitudinal axis.

EXAMINER'S NOTE 2: Swearington, at column 2, lines 46-51 states that the inner ankle brace comprises arms 5 and 6 and cuff portion 8 formed of flexible plastic [examiner's emphasis] material. The examiner posits that it is reasonable to construe their structural capacity as also being substantially rigid. It is not reasonable to regard these elements as bracing supports if the elements lack at least some substantial rigidity; their flexibility must be limited to the extent that they can provide the needed bracing during their intended use.

d. Therefore, it would have been obvious to one of ordinary skill in the art at the time the instant application was made to have modified the skate of Gierveld to include a heel counter and

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pivotaly connected ankle support cuff disposed, mounted within, covered by the skate upper portion, the heel counter projecting upwardly from the heel end of the upper and the cuff not being mechanically fixed to the upper portion so that it is pivotable independently of the upper portion.

e. Regarding the further limitations of claims 15 and 25:

- **wherein the heel counter is fixedly secured to the base.** The combination of Gierveld and Swearington lacks explicit disclosure that the counter is fixed to the base. However, it is old and known in the art to secure elements within athletic footwear in order to have them immediately available in-place as they are to be used when wearing the shoe. Therefore it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to have fixedly secured the internal heel counter and pivotable ankle support cuff apparatus of Swearington in the upper portion of the skate of Gierveld in order to ensure that the device was available and ready in-place in the shoe whenever the skate is to be used; and,

-**wherein the ankle support cuff includes a pad which lines an interior of the cuff.** It is old and well-known to provide pads for portions of wearable sports gear, including footwear. Therefore, it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to provide padding on the interior of the ankle support cuff in order to help prevent chafing of the skater's ankle and leg during skating; and,

-**wherein the ankle support cuff is external to the upper portion.** It is clear from the observation that the upper portion of Gierveld is a low-cut shoe, and therefore that, at least an upper part of the ankle support cuff taught by Swearington would extend outwardly above the

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top of the upper portion of the skate of the combination of Gierveld and Swearington as discussed above.

f. **Regarding the limitations of claim 22** of having a gap defined between a lower rear edge of the cuff and an upper rear edge of the upper portion, it would have been an obvious design choice to have provided for a clearance between the lower rear edge of the cuff and the upper rear edge of the upper of the shoe in order to provide clearance enabling the cuff to pivot without interference by abutting the upper edge(s) of the shoe upper.

4. Claims 17-18, and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gierveld (US 5046746) in view of Swearington (US 5056509), cited by Applicant, and further in view of Olson et al. (US 5171033).

As discussed above, the combination of Gierveld and Swearington discloses all of the features of claim 15 from which claims 17-18 depend. The combination of Gierveld and Swearington lacks explicit disclosure wherein (**re: claim 17**) the ankle pad extends downwardly between the ankle support cuff and within the internal heel counter, and (**re: claim 18**) wherein a lower edge of the ankle pad is free and separate from the internal heel counter.

However, Olson et al. teaches a skate with an ankle cuff (Fig 2, item 30) and employing a pad (26) which lines an interior surface of the ankle cuff and extends downwardly into and is received within an interior of the heel counter (50; refer Fig 2 and associated text, including col 6, lines 37-39, and col 5, lines) and further, wherein the lower edge of the ankle pad is free and separate from the internal heel counter (refer item 26, Figs 1, 2 and col 5, lines 25-28).

Therefore it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to have modified the skate of the combination of Gierveld and

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Swearington to include a pad lining the interior of the ankle cuff and heel counter and separate form the heel counter in accordance with the teachings of Olson et al. in order alleviate chafing of the skater's ankle and leg during skating, as suggested by the reference at column 5, lines 28-31.

5. Claims 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gierveld (US 5046746) in view of Swearington (US 5056509), cited by Applicant, and further in view of Thorson (US 5443267).

As discussed above, the combination of Gierveld and Swearington discloses all of the features of claim 15 from which claims 19-21 depend.

The combination of Gierveld and Swearington is silent regarding the skate further comprising (**re: claim 19**) at least a partial outer ankle shell that is non-rigid (**re: claim 20**) covering an exterior of the cuff, wherein (**re: claim 21**) at least a portion of the cuff is exposed between the outer ankle shell and the upper portion of the shoe.

However, Thorson teaches an ankle support cuff (16) pivotably connected to a heel counter (22; refer also to Figs 5, 6) for use within a sport shoe further comprising a non-rigid partial outer ankle shell (30) covering an exterior of the cuff wherein a portion of the ankle support cuff is exposed between the outer ankle shell and the upper of the shoe.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to have modified the skate of the combination of Gierveld and Swearington to include a non-rigid partial outer ankle shell covering an exterior of the cuff and wherein a portion of the cuff is exposed between the shell and the shoe upper portion in accordance with the teachings of Thorson in order to ensure a firmly secure, but comfortable

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attachment of the ankle support cuff to the ankle and leg of the skater while the ankle undergoes flexing during skating.

6. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Gierveld (US 5046746) in view of Swearington (US 5056509), cited by Applicant, and further in view of Olson et al. (US 5171033).

As discussed above, the combination of Gierveld and Swearington teaches a skate having all of the features of claim 15 from which claim 24 depends.

The combination of Gierveld and Swearington lacks explicit disclosure that the upper portion comprises a breathable fabric.

However, Olson et al. teaches the use of a breathable fabric in the construction of an in-line skate (refer col 5, lines 35-39).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to have modified the disclosure of the combination of Gierveld and Swearington to indicate the use of a breathable fabric for the upper portion in accordance with the teachings of Olson et al. in order to provide a wicking effect to absorb and draw foot moisture away from the foot as suggested by the reference at column 5, lines 35-39).

7. Claim 26, as best understood by the examiner, is rejected under 35 U.S.C. 103(a) as being unpatentable over Gierveld (US 5046746) in view of Swearington (US 5056509), cited by Applicant.

a. Gierveld discloses an in-line skate including wheels, a base defining an upper and lower surface and a longitudinal axis, a frame secured to the base and mounting the wheels, a

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pliable upper portion extending upwardly from the base and adapted to terminate below the ankle of the received skater's foot.

b. Gierveld lacks explicit disclosure of a substantially rigid internal heel counter mounted within and at least partially covered by the pliable upper portion and an external substantially rigid ankle cuff pivotally connected to the internal heel counter, the pivotability being free of any substantial resistance from the pliable upper portion and wherein the external ankle cuff pivots only about an axis that is transverse to the longitudinal axis defined by the base.

c. However, Swearington teaches a substantial rigid heel counter adapted to be mounted within and at least partially covered by the upper portion of an athletic shoe, and having an external ankle cuff pivotally connected to the heel counter and pivotable relative to the heel counter free of resistance from the upper portion wherein the cuff pivots about an axis that is transverse to the longitudinal axis defined by the base.

d. Therefore, it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to have modified the skate of Gierveld to incorporate the internal heel counter and external ankle cuff pivotally connected thereto in accordance with the teachings of Swearington in order to provide a comfortable ankle support stabilizing the ankle from rotations except about an axis transverse to the longitudinal axis of the upper portion in order to help support the ankle against injury during skating maneuvers while still permitting rotation about the transverse axis as suggested by the reference at column 1, lines 53-57.

e. Although Gierveld is silent as to the upper portion being pliable, Gierveld clearly implies that the upper is at least pliable by showing shoe laces for closing and securing the shoe over the foot of the skater (see Fig 4).

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f. Regarding the limitation that the cuff pivot connection to the internal heel counter permits rotation **only about a transverse axis**, Swearington's design uses two pivot elements to permit (1) rotations of the cuff about a transverse axis (refer Fig 1, item 14) that are normal extent for flexion of the foot, and (2) rotations of limited range about a longitudinal axis (item 18) defined by the shoe upper portion (refer col 1, lines 49-57) .

However, it has been held to be within the skill of a worker in the art to omit an element and omit the feature provided thereby. Therefore, it would have been obvious to omit the element enabling rotation about the longitudinal axis, the resulting device thus permitting the pivoting function only about an axis transverse to the longitudinal axis because the function of pivoting about the longitudinal axis is not desired or required. *Ex parte Wu*, 10 USPQ 2031 (Bd. Pat. App. & Inter. 1989); *In re Larson*, 340 F.2d 965, 144 USPQ 347 (CCPA 1965); and, *In re Kuhle*, 526 F.2d 553, 188 USPQ 7 (CCPA 1975).

8. Claim 27, as best understood by the examiner, is rejected under 35 U.S.C. 103(a) as being unpatentable over Gierveld (US 5046746) in view of Swearington (US 5056509), cited by Applicant, and further in view of Olson et al. (US 5171033).

As discussed above, the combination of Gierveld and Swearington discloses all of the features of claim 26 from which claim 27 depends.

The combination of Gierveld and Swearington is silent regarding the use of an ankle pad lining an interior surface of the external ankle cuff and extending downwardly into and received within an interior of the heel counter.

However, Olson et al. teaches a skate with an ankle cuff (Fig 2, item 30) and employing a pad (26) which lines an interior surface of the ankle cuff and extends downwardly into and is

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received within an interior of the heel counter (50; refer Fig 2 and associated text, including col 6, lines 37-39, and col 5, lines).

Therefore it would have been obvious to one of ordinary skill in the art at the time the instant invention was made to have modified the skate of the combination of Gierveld and Swearington to include a pad lining the interior of the ankle cuff and heel counter in accordance with the teachings of Olson et al. in order alleviate chafing as suggested by the reference at column 5, lines 28-31.

Response to Arguments

9. Applicant's arguments filed 12/05/2004 have been fully considered but they are not persuasive.

a. Regarding Applicant's arguments against the use of Gierveld (US 5046746):

(i) Applicant argues that "nothing in Gierveld teaches or suggests a non-rigid or pliable upper portion of the shoe". The examiner disagrees. As indicated in the previous Office Action although Gierveld lacks explicit disclosure that the upper portion of the shoe is non-rigid or pliable, the non-rigidity or pliability of the material of which the upper is constructed is implied by the use of lacing (see Fig. 4) for closing and securing the shoe over the foot of the skater.

b. Regarding Applicant's arguments against the use of Swearington (US 5056509):

(i) Based on a reading at column 2, lines 46-51 of the reference where Swearington states that "the inner ankle brace comprising the arms 5 and 6 and cuff portion 8 is formed of flexible plastic material" [examiner's emphasis], Applicant argues that Swearington thereby does not disclose a "substantially rigid [examiner's emphasis added] ankle cuff". The examiner disagrees. Since the ankle brace of Swearington is designed to provide bracing support for the

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user's ankle, it is clearly implied thereby that the support elements 5, 6 and 8 of Swearington, although made of flexible plastic material, that by the very nature that they provide a bracing function, it is reasonable to construe their structural capacity as also being substantially rigid. It is not reasonable to regard these elements as bracing supports if the elements lack at least some substantial rigidity.

(ii) Applicant states that all of the pending claims include the limitation that the ankle support cuff (per claim 15)/assembly (per claim 25) is constrained to pivot about an axis transverse to the longitudinal axis defined by the base, and alleges that Swearington does not disclose an ankle brace that is constrained [to] pivot about a transverse axis. The examiner disagrees. Clearly, as shown in figures 4 and 5 Swearington, being relied upon in the rejections for the pivotable ankle support cuff/assembly, provides a pivot (item 14) constraining rotational motion of the ankle support cuff/assembly about a transverse axis and provides a pivot (item 17) constraining its motion about a longitudinal axis. Therefore, as discussed herein above in the rejections of claims 15 and 25 and their dependents under 35 U.S.C. 103(a) the combination of Gierveld and Swearington, clearly reads on the limitation as broadly claimed of an in-line skate comprising a substantially rigid ankle support cuff (per claim 15) / assembly (per claim 25) constrained to pivot about an axis transverse to the longitudinal axis ... [of the skate].

Regarding the limitations of claim 26, wherein the limitation in regards to the pivotable motion of the ankle cuff is narrowed (compared to that of claims 15 and 25) to recite that the "ankle cuff pivots only [examiner's emphasis] about an axis that is transverse to the longitudinal axis ...", the case law of *Ex Parte Wu*, *In re Larson*, and *In re Kuhle* is invoked in the rejection herein above of claim 26 under 35 U.S.C. § 103(a) to establish that it would have been obvious

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to a worker in the art to eliminate the undesired pivot about the longitudinal axis from the apparatus of the combination of Gierveld and Swearington.

Finally, the examiner would also bring to Applicant's attention the prior art reference of Hofmeister (US 1205206) cited by Applicant, which teaches for a sport shoe an insertable ankle support that is configured to pivot about only a single axis, that axis being transverse to the longitudinal axis, which also could conceivably be combined with Gierveld for rejection of the independent claim 26 under 35 U.S.C. 103(a).

(iii) Applicant further disputes the applicability of the precedent law cited by the examiner to take the position that although Swearington discloses an ankle support cuff rotatable about each of a longitudinally disposed pivot axis and a transversely disposed pivot axis it would have been obvious to one of ordinary skill to omit the feature enabling rotation about the longitudinal axis if unwanted so that the resulting device permits the pivoting function only about the desired transverse axis, the examiner citing *Ex Parte Wu*, 10 USPQ 2031 (Bd. Pat. App. & Interf. 1989); *In re Larson*, 340 F.2d 965, 144 USPQ 347 (CCPA 1965); and, *In re Kuhle*, 526 F.2d 553, 188 USPQ 7 (CCPA 1975).

Applicant disputes the examiner's position by choosing details of the precedent set by the *Ex Parte Wu* case and addresses the specifics of claims found in the case of *Ex Parte Wu* that are drawn to methods having to do with corrosion of metallic surfaces and involving chemical constituents of polybasic acids. In so doing, Applicant disregards the like rulings in the other two cited cases particularly overlooking *In re Larson* which deals with a case in the mechanical arts. In so doing, Applicant misconstrues the effectiveness of the cited case law which is: the principal of intellectual property law established by these cases ruling that, with respect to a claim, when a

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prior art reference is shown to meet the limitations of the claim, but in addition is found to have additional features providing additional functions, it has been held to be within the skill of a worker in the art to omit an element found in the prior art reference and to omit the function provided thereby because the additional function of that element is not desired or required. See *In re Larson*, 340 F.2d 965, 144 USPQ 347 (CCPA 1965); page 350, paragraph [3] which states "If this additional feature is not desired, it would seem a matter of obvious choice to eliminate it and the function it serves." See also MPEP § 2144 and § 2144.04.

Action made Final

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

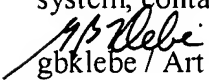
Conclusion


11. Any inquiry concerning this or earlier communication(s) from the examiner should be directed to Gerald B. Klebe at 703-305-0578, fax 703-872-9306; Mon.-Fri., 8:00 AM - 4:30 PM ET, or to Supervisory Patent Examiner Christopher P. Ellis, Art Unit 3618, at 703-308-2560.

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Official correspondence should be sent to the following TC 3600 Official Rightfax numbers as follows: Regular correspondence: 703-872-9326; After Finals: 703-872-9327; Customer Service: 703-872-9325.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


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